COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6100

December 21, 2018

SUBMITTED VIA REGULATIONS.GOV

The Honorable John F. Ring
Chairman
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Re: Comments Regarding RIN 3142-AA13: The Standard for Determining Joint-Employer Status

Dear Chairman Ring:

We write in response to the National Labor Relations Board's (NLRB or Board) September 14, 2018, notice of proposed rulemaking (RIN 3142-AA13) updating the standard for determining joint-employer status.[1] We strongly support the proposed rule because it restores a reasonable and appropriate interpretation of the *National Labor Relations Act* (NLRA) and creates greater clarity and increased opportunity for all affected stakeholders, including entrepreneurs and workers.

In August 2015, the Board upended more than 30 years of precedent with its *Browning-Ferris Industries* decision, holding that a business need only demonstrate "indirect" or "potential control" over workers in order to be considered a joint employer.[2] Prior to *Browning-Ferris*, the Board had made clear that businesses must possess and exercise "direct and immediate" control over workers in order to be considered joint employers, meaning they were directly involved in determining essential terms and conditions of employment, such as hiring, firing, and disciplining workers.[3] The Obama Board's 2015 decision was not only a misinterpretation of the NLRA, it also created compliance chaos as the Board provided no additional guidance. As such,

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[1] The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681 (proposed Sept. 14, 2018).
[2] 362 NLRB No. 186 (2015).
[3] *Airborne Express*, 338 NLRB 597, 597 n.1 (2002) ("[T]he Board's test for determining whether two separate entities should be considered to be joint employers … has been a matter of settled law for approximately 20 years…. The essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate."), *overruled by Browning-Ferris Indus.*, 362 NLRB No. 186.

businesses and employees were forced to grapple with conflicting joint-employer standards under other federal laws such as the *Fair Labor Standards Act* (FLSA) and the *Occupational Safety and Health Act* (OSH Act) at the same time. This decision has created a confusing and unworkable situation that undermines the business models of U.S. companies small and large, including contractors and subcontractors and locally-owned and operated franchises.

As the committee of jurisdiction over the NLRA and the NLRB, the House Committee on Education and the Workforce (Committee) has examined this issue exhaustively. Since 2014, the Committee has held numerous hearings and heard testimony from a variety of stakeholders, including employers, workers, legal and human resource professionals, and academics, among others. After conducting these hearings, the Committee advanced H.R. 3441, the *Save Local Business Act*, introduced by Subcommittee on Workforce Protections Chairman Bradley Byrne (R-AL), to amend the NLRA and the FLSA to codify the long-standing direct, actual, and immediate joint-employer standard that existed prior to August 2015. The House of Representatives passed H.R. 3441 with bipartisan support in November 2017.

The comments we are submitting are based on the Committee's own analysis of the joint-employer issue, as well as the testimony delivered to the Committee by stakeholders and policy experts. These comments are intended to encourage the Board to adopt the pending rule requiring a business to exercise substantial direct and immediate control over essential terms and conditions of employment in order to be considered a joint employer under the NLRA.

The Joint-Employer Standard Prior to *Browning-Ferris* Provided Clarity and Certainty

Prior to 1984, there was no clearly defined standard to determine what was or was not a joint-employer relationship. However, in 1984, the Board ruled on two cases that made its interpretation of the NLRA clear and consistent on this issue: *Laerco Transportation*[4] and *TLI, Inc.*[5]

In *Laerco Transportation*, the aforementioned company was provided drivers by a separate firm, CTL, which made all decisions pertaining to employment, including hiring, firing, and discipline, while Laerco handled daily oversight. Here, the Board ruled that a joint-employer relationship did not exist because in order to establish such status "there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[6] Laerco's daily oversight fell short of this standard. *TLI, Inc.* also involved drivers provided by one company to another. Here too, the Board ruled that TLI, the company supplying the drivers, was the sole employer because it oversaw drivers' employment relationship, including disciplinary proceedings, while Crown, the

[4] 269 NLRB 324 (1984), *overruled by Browning-Ferris Indus.*, 362 NLRB No. 186.
[5] 271 NLRB 798 (1984), *overruled by Browning-Ferris Indus.*, 362 NLRB No. 186.
[6] *Laerco Transp.*, 269 NLRB at 325.

company that received the drivers, only made routine determinations such as delivery assignments, which the Board ruled fell short of the meaningful supervision necessary for joint-employer status.

The Board made clear in these two cases that in order to meet the standard for joint employment a company must exercise control over matters directly pertaining to workers' employment, such as hiring and firing. Day-to-day oversight of activities that are part of a worker's job was considered insufficient to meet the "employer" threshold. This clear and sensible standard was reaffirmed and strengthened in the following years when the Board ruled that not only must businesses exercise control of the employment relationship but that control must be substantial, direct, and immediate—meaning it is not dependent on the other party in the contract. In *Airborne Express*, the Board stated that a putative joint employer's control over employment matters must be "direct and immediate" and upheld that control must be "substantial" rather than "minimal and routine" to meet the standard of joint employment.[7] Moreover, in *AM Property Holding Corp.*, the Board ruled that a joint-employer analysis must consider "the actual practice of the parties" rather than just potential control of workers and that a business telling workers what work to perform, "but not how to perform the work," was insufficient to conclude joint-employer status.[8]

Just as important as the content of the joint-employer standard prior to the 2015 *Browning-Ferris* decision was its reliability. It was based on real-world facts, events, and decisions made by the companies, rather than on abstract assumptions or conclusions drawn thereafter. Mr. Zachary D. Fasman, partner in the law firm Proskauer Rose LLP, testified before the Workforce Protections and the Health, Employment, Labor, and Pensions (HELP) Subcommittees in September 2017 regarding the reliability of the prior joint-employer standard:

> This standard, which was based upon the **actual conduct** of the parties as opposed to hypothetical after the fact legal conclusions about retained but unexercised authority, afforded stability and predictability in business relationships while allowing collective bargaining between unions and the "direct" employer that actually set the terms and conditions of employment. For more than 30 years, the NLRB and the courts applied this standard by determining the **actual relationship** between the two businesses in question; who hired, fired, disciplined, supervised, or directed the employees.[9]

The pre-2015 standard allowed businesses to plan and execute contracting, franchising, and employment relationships and provided clarity and certainty about where lines must be drawn regarding joint-employer status and related legal and regulatory requirements. Unfortunately, the

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[7] 338 NLRB at 597 n.1, 605.
[8] 350 NLRB 998, 1000, 1001 (2007), *overruled by Browning-Ferris Indus.*, 362 NLRB No. 186.
[9] *H.R. 3441: Save Local Business Act: Hearing Before the Subcomms. on Workforce Protections and Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 115th Cong. (2017) (prepared statement of Mr. Zachary D. Fasman) (emphasis in original).

Board upended that certainty in 2015 with its decision in *Browning-Ferris*. Since then, employers and employees alike have been left with a shifting and confusing regulatory and legal landscape.

The 2015 *Browning-Ferris* Decision Undermined Congressional Intent

The Obama NLRB's joint-employer standard misinterpreted Congress' original intent in the NLRA and its amendments. Specifically, Congress clearly delineated that the Board should use common law principles of agency in determining whether an employer-employee relationship exists, and that common law means the Board must demonstrate that one party exercises direct control over the wages and employment status of the other. *Browning-Ferris* deviated from those specific directions and replaced them with an abstract standard broader than what was intended in the text of the law and subsequent amendments. Mr. G. Roger King, Senior Labor and Employment Counsel for the HR Policy Association, testified before the Committee in July 2017 about congressional intent:

> In 1947, the Congress expressly directed in the Taft-Hartley amendments to the NLRA that the Board utilize common law principles of agency when determining the questions of employee and employer status. The Congress specifically overruled an earlier Supreme Court decision in *NLRB v. Hearst Publication, Inc.*, 322, U.S. 111 (1944), which had disregarded common law principles of agency, and held that "independent contractors" could be considered "employees" under the NLRA....
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> It is clear that what Congress did in 1947 was designed to reinforce the applicability of common law agency principles to determine who is an employer and who is an employee under the NLRA. Thereafter, the Supreme Court has consistently utilized common law agency principles to determine who is an employee and who is an employer, *Town & Country, Elec.*, 516 U.S. 85 (1995).[10]

In the same testimony, Mr. King referenced the legislative history of the Taft-Hartley amendments, reinforcing Congress' specific intent to use common law principles and Congress' pointed criticism of the Board's failure to do so in determining an employer-employee relationship. The House Committee Report accompanying the *Taft-Hartley Act* says of the word "employee":

> According to all standard dictionaries, according to the law as the courts have stated it, and according to the understandings of almost everyone, with the exception of members of the [NLRB], means someone who works for another for hire ... [and who] worked for wages or salaries under direct supervision.... It must be presumed that when Congress passed the Labor Act, it intended words it

[10] *Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship: Hearing Before the H. Comm. On Educ. and the Workforce*, 115th Cong. (2017) (prepared statement of Mr. G. Roger King).

> used [such as "employee"] to have the meaning they had when Congress passed the Act, not new meanings that, nine years later, the Labor Board might think up.... [I]t is inconceivable that Congress, when it passed the Act, authorized the Board to give every word in the Act whatever meaning it wished.[11]

This Committee Report language is consistent with the joint-employer standard that existed prior to 2015, requiring direct and immediate exercised control in order for a company to be considered a worker's "employer." However, the Board's vague and expansive 2015 decision in *Browning-Ferris*, which allowed for indirect or potential control for a business to be considered a joint employer, is inconsistent with the common law principles of agency that Congress intended to define the employer-employee relationship.

The 2015 *Browning-Ferris* Decision Harmed Businesses, Workers, and Consumers

Equally as egregious as the statutory chaos created by the Obama administration NLRB's *Browning-Ferris* decision is its practical implications. Subcontracting, franchising, and corporate social responsibility arrangements have allowed entrepreneurs the opportunity to start and grow local businesses with the flexibility that unique markets demand, while still being afforded the help and support that a larger entity can offer in the form of guidance, resources, best practices, and other assistive services. The Board's broad and ambiguous joint-employer standard has exposed those larger entities to increased risk of operational burdens and litigation. As a result, contractors and franchisors are now being forced to decrease local flexibility and increase control or, conversely, dramatically curb the connections and resources they offer to subcontractors and franchisees. This reality means fewer franchising and subcontracting opportunities for entrepreneurs, fewer resources and "good deeds" provided by businesses, fewer jobs and opportunities for workers, and higher costs for consumers.

Under the Obama NLRB's standard, a natural reaction for franchisors and contractors to avoid the regulatory and legal risks that accompany unclear joint-employer status is to decrease the flexibility franchisees and subcontractors are allowed in running their independent businesses. This development means more time and resources diverted away from companies' comparative advantages and toward decisions that should be left to local entrepreneurs who better understand unique local markets. Ms. Jagruti Panwala, a Pennsylvania-based hotel owner and operator, explained this to the HELP Subcommittee in 2014 in anticipation of the Obama NLRB's decision in *Browning-Ferris*:

> Essentially, I would no longer be in business for myself. Instead of simply acting as a licensor, collecting fees, and providing guidance from time to time, the franchisor would likely feel the need to become a partner who would inherently have a lesser understanding of operating conditions than I do, and try to have disproportionate influence on business and staffing decisions.... If this were to

[11] *Id.* (quoting H.R. Rep. No. 245 at 18, 80th Cong., 1st Sess. (1947)).

> happen, I would essentially become an employee of the parent corporation and no longer an entrepreneur. I would lose the equity I have built in my business overnight based on the decision of an unelected bureaucrat in Washington.[12]

On the other hand, some contractors and franchisors have been forced to cut assistance to subcontractors and franchisees, for fear of triggering the ambiguous joint-employer standard. Many businesses offer their subcontractors and franchisees assistive services, guidance, and resources to help them be successful, increasing opportunity for local entrepreneurs. Mr. Kevin R. Cole, Chief Executive Officer of Ennis Electrical Company, explained to the HELP Subcommittee on behalf of the Independent Electrical Contractors in September 2015 how *Browning-Ferris* undermines this model:

> Moving forward, almost any contractual relationship we enter into may trigger a finding of joint employer status that would make us liable for the employment and labor actions of our subcontractors, vendors, suppliers, and staffing firms. In addition, as we understand it, the new standard would also expose my company to another company's collective bargaining obligations and economic protest activity, to include strikes, boycotts, and picketing.... This new standard also prevents us from working with certain start-ups or new small businesses that may have a limited track record. For example, my company will take on certain small businesses as subcontractors, which will often times be owned by minorities or women, and help them on certain projects. With this new standard, I'm now less likely to take on that risk.[13]

Importantly, the support companies provide their subcontractors falls short of directly exercising control over employment decisions, such as hiring, firing, and discipline, and is consistent with the pre-2015 joint-employer standard. But *Browning-Ferris*' indirect or potential control standard leaves the situation so unclear that companies are choosing to avoid the risk altogether. Ms. Tamra Kennedy, President of Twin City Taco John's, told the Workforce Protections and HELP Subcommittees about this problem in September 2017:

> Joint employer has negatively affected my business in several ways. First, my franchisor used to provide standard employee handbooks to its franchisees. But due to expanded joint employment liability, the company no longer provides me employee handbooks.... Now, I must hire an outside attorney to write an employee handbook for me. It cost my business $9,000 to have outside counsel

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[12] *Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?: Hearing Before the Subcomm. On Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 113th Cong. (2014) (prepared statement of Ms. Jagruti Panwala).

[13] *H.R. 3459: Protecting Local Business Opportunity Act: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce,* 114th Cong. (2015) (prepared statement of Mr. Kevin R. Cole).

> prepare my employee handbook. Not to mention, I need my attorneys to update my handbook each time the law changes....
>
> Second, I no longer receive a job application from my franchisor. I must create my own application now ... another recurring cost for which the new joint employer doctrine is responsible.
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> A third example is that joint employment liability means I must recruit employees on my own. For years, our brand company has produced and provided its
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> franchise owners employee recruiting kits.... Today, because of the fear of joint employment liability, these essential recruitment tools are no longer available to franchisees ... creat[ing] another barrier to hiring great people, so unfortunately, I'm creating jobs in my community slower than I otherwise would.[14]

The Obama NLRB's joint-employer standard is functionally harmful, and its ambiguity coupled with the varying standards in other federal employment laws has created enormous compliance burdens. Businesses simply have no way to determine what level of control is necessary or appropriate to avoid joint-employer status, a new consideration that goes beyond the goal of running an effective and efficient operation. Workplace dispute resolution now varies depending on which law's joint-employer standard a particular situation is subject to, and workers and management alike must navigate a labyrinth of complex tests, legal cases, and definitions to reach conclusions. This problem was made even worse when the Board vacated its *Hy-Brand* decision overturning *Browning-Ferris* in February 2018.[15] While the Board is only responsible for the NLRA, clarifying the NLRA standard is vitally important.

Because *Browning-Ferris* provided no guidance to employers, and joint-employer questions are now assessed on a case-by-case basis, the status quo undermines stability and predictability, both of which are essential for economic success. Increased time and money spent on regulatory and legal compliance are sunk costs that not only divert resources away from economic growth and investment, but also mean higher costs for consumers and fewer opportunities for workers. In fact, a study from the American Action Forum in April 2017 projected that the Obama Board's joint-employer standard could result in 1.7 million fewer jobs.[16] At a time when the American economy is significantly improving, the federal government must do its utmost to stay out of the way of furthering job creation, but the existing joint-employer standard does the opposite.

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[14] *H.R. 3441: Save Local Business Act: Hearing Before the Subcomms. on Workforce Protections and Health, Employment, Labor, and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong. (2017) (prepared statement of Ms. Tamra Kennedy).

[15] *Hy-Brand Indus. Contractors, Ltd.*, 366 NLRB No. 26 (Feb. 26, 2018) (order vacating decision and order and granting motion for reconsideration in part).

[16] BEN GITIS, AM. ACTION FORUM, THE NLRB'S JOINT EMPLOYER STANDARD, UNIONS, AND THE FRANCHISE BUSINESS MODEL (Apr. 26, 2017), https://www.americanactionforum.org/research/nlrbs-new-joint-employer-standard-unions-franchise-business-model/.

Conclusion

For more than 30 years, businesses and workers alike had a clear and sensible standard to determine an appropriate joint-employer framework. Unfortunately, in 2015, the Board chose to discard that standard in favor of a vague and unworkable interpretation that is an affront to federal law and free-enterprise. Despite an improving economy flourishing under President Trump's deregulatory agenda, the Obama NLRB's joint-employer standard remains in place—impeding economic growth, undermining the spirit of local control and entrepreneurship, reducing job opportunities, and increasing consumer costs. We urge the Board to overturn the ambiguous indirect or potential control standard and replace it with a rule requiring substantial direct and immediate control over essential terms and conditions of employment in order for a business to be considered a joint employer. We appreciate the Board's consideration of these comments.

Respectfully submitted,

Virginia Foxx
Chairwoman

Tim Walberg
Chairman
Subcommittee on Health, Employment, Labor, and Pensions